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August 4, 2006

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Comments/Ex Parte Filing and Petition to Intervene of ACS Wireless, Inc.
WT Docket No. 06-114

Dear Ms. Dortch:

This letter is filed on behalf of our clients, Denali PCS, L.L.C. ("Denali") and Alaska DigiTel, L.C.C. ("DigiTel"), with the support and concurrence of General Communication, Inc. ("GCI") (jointly, Denali, DigiTel and GCI are referred to as the "Applicants"). The Applicants are responding to the so-called "Comments/*Ex Parte* Filing and Petition to Intervene" ("Petition") filed on July 21, 2006 by ACS Wireless, Inc. ("ACS") with respect to the applications ("DigiTel Applications") for Commission consent to assign Denali's licenses to DigiTel (File No. 0002453582) and to a transfer of a 78 percent non-controlling interest in DigiTel to GCI (File No. 0002453706). As is set forth in detail below, ACS must not be allowed to exploit the modified *ex parte* procedures governing this proceeding to file a woefully late petition to deny the DigiTel Applications. The Petition should be dismissed as untimely without consideration of its merits.

Processing of the DigiTel Applications is governed by the streamlined processing procedures of § 1.948(j)(1) of the Commission's Rules. Those procedures are designed to allow assignees/transferees the benefit of application "processing that minimizes administrative delay, reduces transaction costs, and otherwise generally facilitates the movement of spectrum toward new, higher valued uses." *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 19 FCC Rcd 17503, 17558 (2004). Whatever remains of those benefits will be lost to the Applicants if the Commission allows ACS to intervene as a party at this late date and considers its grossly untimely Petition.

Public notice that the Digitel Applications had been accepted for filing was given on February 1, 2006 -- more than six months ago. *See Public Notice*, Rep. No. 2383 (Feb. 1, 2006).

The FCC's streamlined procedures called for the filing of any petitions to deny the Digital applications in 14 days or by February 15, 2006. *See* 47 C.F.R. § 1.948(j)(1)(iii). MTA Communications, Inc. d/b/a MTA Wireless ("MTA") filed a petition to deny on the deadline, thereby becoming a party to a restricted adjudicatory proceeding. *See* 47 C.F.R. §§ 1.1202 (d)(1), 1.1208. In contrast, ACS made no filing whatsoever. As it effectively acknowledges, ACS is not a party. *See* Petition, at 19 n.18 (requesting to be considered a party to this proceeding).

From February 15, 2006 until June 8, 2006, the parties to this proceeding (Denali, DigiTel, GCI, and MTA) were prohibited from making *ex parte* presentations on the merits of the DigiTel Applications to decision-making Commission personnel. *See* 47 C.F.R. §§ 1.1202, 1.1208. On June 9, 2006, the Commission announced that this proceeding would be governed by the permit-but-disclose procedures of § 1.1206 of its *ex parte* rules. *See Ex Parte Status of Applications for the Assignment of Licenses from Denali to DigiTel and the Transfer of Control of Interests in DigiTel to GCI*, DA 06-1247, 2006 WL 1584506 (June 9, 2006). Consequently, the parties to this proceeding (Denali, DigiTel, GCI, and MTA) were free to make *ex parte* presentations provided they followed the disclosure requirements of § 1.1206(b). *See id*, DA 06-1247, at 1-2, 2006 WL 1584506, at *1. The Commission modified the *ex parte* procedures ostensibly to permit the parties to make *ex parte* presentations in response to documents and data added to the record after the close of the pleading cycle set by §§ 1.45, 1.939(f), and 1.948(j)(1)(iii) of the Rules.

When it modified the *ex parte* procedures, the Commission did not invite public comments on any matters of record in this proceeding. *See id.*, DA 06-1247, at 1-3, 2006 WL 1584506, at *1-2. Nor did it issue a blanket waiver of §§ 1.45(a), 1.939(a)(2), and 1.948(j)(1)(iii) of the Rules so that a petition to deny the DigiTel Applications could be filed 140 days after the applications appeared on public notice. *See id.* Consequently, those rules remain undisturbed and in effect as far as ACS is concerned.

Nevertheless, ACS used the modification of the *ex parte* procedures as the pretext to file a pleading in which it urges the Commission to deny the DigiTel Applications. *See* Petition, at 1, 20. The pretextual nature of the Petition is demonstrated by the fact that ACS served copies of its "*ex parte* filing" on the parties to this proceeding – meaning that it is not *ex parte* in any sense. *See id.* at 1. *See also* Letter from Elisabeth H. Ross to Marlene H. Dortch, at 2 (July 21, 2006). The Commission must recognize the Petition for what it obviously is in substance – an untimely and disruptive petition to deny.

"The Commission ... is not bound by the title that a filing party gives a pleading, particularly if ... the form chosen appears designed to circumvent [its] procedural rules." *Minnesota PCS L.P.*, 17 FCC Rcd 126, 127 (WTB 2002). Although ACS styled its 20-page pleading as "Comments/*Ex Parte* Filing," the specific relief it explicitly seeks from the

Commission is the denial of the DigiTel Applications. *See* Petition, at 20. Moreover, ACS unsuccessfully attempts to satisfy the formal requirements for a petition to deny under § 309(d) of the Communications Act of 1934, as amended ("Act"), and § 1.939(d) of the Rules. In addition to serving copies of its Petition on Denali, DigiTel, and GCI, ACS attempts to show that it is a party in interest; it argues that grant of the application would be prima facie inconsistent with the public interest; and it supports its Petition with Mr. Doucette's declaration under penalty of perjury. *Compare* Petition, at 3-4, 18, 15, 19 & n.82, 20 *with* 47 U.S.C. § 309(d)(1), 47 C.F.R. § 1.939(d). Moreover, ACS claims that the DigiTel Applications present substantial and material questions of fact that should be designated for an evidentiary hearing under § 309(e) of the Act. *Compare* Petition, at 1, 5, 20 *with* 47 U.S.C. § 309(d)(2). Clearly, unless it is willing to "elevate form over substance," the Commission must "address the Petition as a petition to deny." *Minnesota PCS*, 17 FCC Rcd at 127 & n.6. *See Smith Bagley, Inc.*, 20 FCC Rcd 2361, 2368 (WTB 2005) (dismissing argument as a late-filed petition to deny).

By the Applicants' count, ACS filed its Petition 126 days after the deadline for filing petitions to deny under § 1.948(j)(1)(iii) of the Rules. Like the petitioner in *Americom Network, Inc.*, 16 FCC Rcd 18450, 18452 (WTB 2001), ACS did not request a waiver or extension of the deadline for filing a petition to deny. Therefore, the Commission should follow its practice of "routinely dismiss[ing] untimely petitions to deny." *Applications to Assign Licenses from Alpine-Michigan E, LLC, Alpine-Michigan F, LLC and RFB Cellular, Inc. to Dobson Cellular Systems, Inc.*, 20 FCC Rcd 9822, 9825 (WTB 2005). *See Minnesota PCS*, 17 FCC Rcd at 128; *GlobeCast North America, Inc.*, 17 FCC Rcd 8239, 8241 (WTB 2002).

The Commission should not follow its occasional practice of treating an untimely petition to deny as an informal objection. *See, e.g., Spectrum Communications, Inc.*, 16 FCC Rcd 17679, 17683 (WTB 2001). As demonstrated below, the ACS Petition is either duplicative of issues already presented to the Commission by MTA, or raises frivolous unsupported issues not worthy of the Commission's attention. Most importantly, the Applicants are aware of no case in which the Commission considered the substance of an untimely petition to deny an assignment or transfer of control application that was qualified for streamlined processing. Indeed, it would be completely antithetic to the public interest benefits promised by its streamlined processing procedures for the Commission to decide to address the substance of an untimely petition to deny filed so late in the process. *See also* Joint Opposition to ACS' Acknowledgements of Confidentiality, at 2-4 (July 26, 2006).

The Commission may dismiss the Petition on procedural grounds comfortable that no substantive issues of any significance have been raised. In many respects, the Petition merely parrots claims previously made by MTA. Indeed, the Summary of the Petition commences with the unsurprising statement that ACS "agrees" with MTA. Petition, at i. ACS then proceeds to repeat MTA's claim that GCI will control an "inordinate amount of spectrum." *See* Petition, at

6-10. That contention has already been fully rebutted by the Applicants and need not be separately addressed by the Commission in connection with the Petition.

To the extent that ACS seeks to raise new issues, the allegations are unsupported, wholly speculative, misdirected, and the Commission can take official notice of facts which completely undermine the claims. For example, ACS notes that GCI owns two of the three undersea cables between Alaska and the lower 48 states, and speculates that GCI "could use its market power in the wholesale transport market to restrict competition for lower 48 carriers' roaming agreements for transport within Alaska." Petition, at 10. Of course, GCI presently resells the wireless service of Dobson Cellular Systems ("Dobson"), and relies upon Dobson's roaming relationships in this arrangement. ACS has offered absolutely no evidence - - because there is none - - that GCI favors Dobson in any way in the offering and provision of transport services. The "real risk" that ACS sees of anticompetitive action by GCI in the transport market is purely imagined and totally speculative.

Similarly, the claim that GCI might offer "below-cost transport prices" to thwart competition is specious. *Id.* at 14. GCI has no pricing flexibility on interstate wholesale switched service elements provided over its undersea cable facilities. GCI is bound by the statutory pricing mechanism set forth in Section 112 of Title I of Division J of the Consolidated Appropriations Act, 2005 (PL 108-447) which codified the pricing for such service elements from the Alascom, Inc. Tariff FCC No. 11, and made the pricing applicable to GCI. Thus, GCI does not have the pricing flexibility alleged by ACS.

Finally, ACS clearly is abusing the process when it asks the Commission to "open a proceeding to investigate reclassifying GCI's cable landing licenses as common carrier." *Id.* at ii. Obviously, this request for relief has no place in the current assignment and transfer proceeding, and clearly reveals the intention of ACS to impede action upon the applications by raising unrelated issues.

Very truly yours,

Russell D. Lukas
Thomas Gutierrez

cc: Erin McGrath
Susan Singer
Carl W. Northrop.
Stefan M. Lopatkiewicz
Elisabeth H. Ross